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April 26, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: November 8, 2004
Case No.: TIA-0315

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to her work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant appealed to the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.'

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a clerk typist at the DOE's Idaho National Engineering Laboratory (the site). The Applicant filed a Subpart B application with the DOL and a Subpart D application with the OWA. The Applicant claimed that her bilateral breast cancer, endometrial cancer, and skin cancer were associated with radiation exposure at DOE. The DOL requested that the National Institute of Occupational Safety and Health (NIOSH) undertake a radiation dose reconstruction. The Applicant elected to go forward with her Subpart D claim without waiting for the dose reconstruction, Record at 23, and the OWA forwarded her case to the Physician Panel.

The Panel addressed the claimed illnesses. The Panel discussed the Applicant's 1987 diagnosis of bilateral breast cancer, and the 1996 diagnoses of endometrial cancer and skin cancer on the nose and lip. The Panel found that it was unlikely that the Applicant was exposed to radiation, citing her employment as a clerk typist, her

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g).

brief period of employment, and reports of dosimetry records showing no radiation exposure. Based on the lack of evidence of radiation exposure, the Panel found insufficient evidence to demonstrate that her cancers were related to her DOE employment.

The OWA accepted the determination, and the Applicant appealed. The Applicant maintains that she has no family history or other risk factors for these cancers. Accordingly, the Applicant concludes that radiation exposure is the "only plausible explanation."

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's argument that radiation is the "only plausible explanation" for her cancers does not indicate Panel error. As an initial matter, we note that the Applicant's contention that she has no risk factors lacks specificity and, therefore, cannot be evaluated. More importantly, however, the absence of other risk factors does not establish that "it is at least as likely as not" that the cancers were related to radiation exposure at DOE. The Panel considered the Applicant's job description, her period of employment, and the occupational radiation records showing no radiation exposure. Panel Report at 1, 3, 4; Record at 152, 153. The Applicant has failed to allege, let alone demonstrate, Panel error on those matters. Instead, the Applicant merely disagrees with the Panel's judgment, which is not a basis to grant the Appeal.

As indicated above, NIOSH is undertaking a dose reconstruction for the Applicant. If NIOSH issues a report that supports the Applicant's claim of exposure, she should

raise the matter with the DOL in conjunction with her Subpart E claim.

In compliance with Subpart E, this claim will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the DOLS's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0315 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 26, 2005